Supreme Court, U.S.
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No. 06-1719

IN THE

Supreme Court of the United States

ALICE LARAINE DIMERY,

Petitioner,

—v.—

ULSTER SAVINGS BANK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS, STATE OF NEW YORK

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF ISSUES PRESENTED

1. Can Petitioner obtain a *writ of certiorari* after already having been denied this relief for the same issues in the same case?
2. Assuming Petitioner had not already petitioned for a *writ of certiorari* on the same issue, is a petition timely when filed approximately 580 days after the decision by the State court of last resort?
3. Does the correction of a typographical error by a State appellate court create a separate, constitutional violation which justifies review by this Court of a second petition for a *writ of certiorari*?

RULE 29(6) STATEMENT

Ulster Savings Bank is a banking corporation organized and existing under the laws of the State of New York as a mutual savings bank. Ulster Savings Bank has seven subsidiaries, which are Robert J. Ryan, Inc., First Capitol Payment Corp., Ryan Associates of the Hudson Valley, Inc., Ulban of New York, Inc., USB Agency, Inc., USB Assignment Corp. and Ulster Home Mortgage, Incorporated. Ulster Savings Bank does not have a parent company and no publicly held company owns ten percent or more of its stock.

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OPINIONS BELOW

The October 26, 2000 Judgment of the Supreme Court of the State of New York, County of Putnam (Index No. 230-93), from which Petitioner's appeal was taken, dismissing Petitioner's Complaint and granting Respondent's counterclaim is unreported. (The May 19, 2000 Decision and Order of the Supreme Court of the State of New York, County of Putnam, which adjudicated the parties' several legal claims, is also unreported.)

The December 27, 2004 Decision and Order of the Supreme Court of the State of New York, Appellate Division, Second Department, denying Petitioner's appeal is reported at 13 A.D.3d 574, 789 N.Y.S.2d 159 (2d Dep't 2004).

The Supreme Court of the State of New York, Appellate Division, Second Department's March 28, 2005 Decision denying Petitioner's motion to reargue, resettle and amend its Decision and Order or, in the alternative, for leave to appeal (Docket No.: 2000-10282) is unreported.

The New York State Court of Appeals' July 6, 2005 Decision denying Petitioner's motion for leave to appeal (Motion No.: 527) is referenced in a table at 5 N.Y.3d 706, 835 N.E.2d 659, 801 N.Y.S.2d 799 (2005).

The Court of Appeals' November 17, 2005 Decision denying Petitioner's Motion to Reargue for Leave to Appeal (Motion No.: 871) is referenced in a table at 5 N.Y.3d 880, 842 N.E.2d 29, 808 N.Y.S.2d 143 (2005).

The United States Supreme Court's April 24, 2006 Decision denying Petitioner's Petition for a *Writ of Certiorari* is reported at 547 U.S. 1097 (2006).

The Appellate Division's August 8, 2006 Decision and Order, which corrected a typographical error in its

March 28, 2005 Decision and Order (Docket No.: 2000-10282) is unreported.

The Appellate Division's October 3, 2006 Decision and Order denying Petitioner's motion to reargue (Docket No.: 2000-10282) her January 31, 2005 motion to reargue, or in the alternative, to reargue the Second Department's December 27, 2004 Decision & Order, is unreported.

The New York State Court of Appeals' December 21, 2006 Decision dismissing Petitioner's appeal as untimely (Motion No.: 1372) is also unreported.

Finally, the Court of Appeals' March 27, 2007 Decision denying Petitioner's motion to reargue (Motion No.: 207) is also unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (2000); however, as discussed below, Petitioner has already invoked this Court's jurisdiction under this statute in this case for the same issues she raises here and was previously denied.

COUNTER-STATEMENT OF THE CASE

The simple fact is this is nothing more than a belated attempt to re-argue a prior petition. Petitioner's Petition should be denied because this Court lacks subject matter jurisdiction since the Petition is duplicative of Petitioner's prior petition, the Petition is untimely, and it does not involve any constitutional issues.

Petitioner's Petition is impermissible because it is duplicative of Petitioner's prior petition to this Court from the same December 27, 2004 Decision and Order.

Petitioner has had her opportunity to seek a writ from this Court, and this Court denied that petition. Nothing has changed and neither should this Court's decision.

Petitioner's appeal is also plainly untimely. A party seeking a *writ of certiorari* has 90 days from the date the State's court of last resort enters its decision to file a petition with the Court. Here, Petitioner seeks review of the New York State Appellate Division's December 27, 2004 decision. New York's court of last resort denied Petitioner's motion to reargue her motion for leave to appeal this decision on November 17, 2005. Petitioner is more than 450 days too late.

Finally, the Petition does not present any constitutional issues. Instead, she attempts to rehash her old arguments related to factual decisions of the trial court with which she disagrees with every Court that has heard this case. The only difference this time around is the Appellate Division corrected a typographical error in its decision denying Petitioner's motion to reargue. Certainly this clerical issue does not now create an important constitutional issue appropriate for review by this Court.

COUNTER-STATEMENT OF PROCEDURAL HISTORY

This case centers around a 1985 written agreement between the parties to develop and sell 19 acres of real property (eleven modest building lots) in Ulster County, New York. The parties envisioned that the eleven lots would be sold within 6 months, at significant profits; instead, the sales took 6 years and, halfway through in 1987, the real estate market sustained a well-known downturn. In fifteen years of ensuing litigation, the main issues were: (1) whether the parties' agreement created

a *joint venture or reinstated* the parties' prior mortgagor-mortgagee relationship; (2) whether Respondent engaged in multiple sales of the eleven subdivided parcels and, as such, whether Respondent properly accounted for joint venture proceeds; and (3) how to account properly for the relevant real estate transactions given the particular circumstances of each sale (e.g. option contract, associated building loans, etc.). In sum, the trial court held, and the Appellate Division unanimously affirmed, applying relevant New York precedents, that the parties' agreement created a joint venture, that the joint venture was unprofitable, and that Petitioner failed to produce any evidence to support her fraud claims.

In a subsequent appeal to the New York State Court of Appeals, Petitioner wholly refashioned her claims—into alleged Constitutional deprivations and supposedly novel issues of public importance. The Court of Appeals denied Petitioner's motion for leave to appeal and her subsequent motion for reargument. Petitioner again recast this real property dispute into strained Constitutional and banking regulatory claims when she petitioned this Court for a *writ of certiorari*. On or about April 24, 2006, this Court denied Petitioner's petition.

Petitioner has since found a typographical error in an Appellate Division decision and started all over again. On August 8, 2006, the Appellate Division recalled and vacated its March 28, 2005 Decision and Order—which denied Petitioner's motion to reargue the appeal—and substituted a revised Decision and Order, which corrected a typographical error contained in its earlier Decision and Order. The March 28, 2005 Decision stated that the "[m]otion by the *respondent-appellant* for leave to reargue . . . is denied, with $100 costs." (Emphasis added.) Accepting this Decision, Petitioner paid the $100 and moved the Court of Appeals for leave to

appeal. After this Court denied Petitioner's Petition, the Appellate Division realized that it mistakenly listed "respondent-appellant" (the Respondent here) in its March 28, 2005 Decision instead of "appellant-respondent" (the Petitioner), who was the only party that moved to reargue the Appellate Division's December 27, 2004 decision. As a result, on August 8, 2006, the Appellate Division vacated its March 28th decision and ordered that the "[m]otion by *appellant-respondent* for leave to reargue . . . is denied, with $100 costs." (Emphasis added.)

Petitioner then filed a motion in the Appellate Division to reargue the December 27, 2004 Decision and Order, or in the alternative her January 31, 2005 motion to reargue, which was denied.

Petitioner then appealed the December 27, 2004 Decision and Order to the New York State Court of Appeals, which it dismissed as untimely. The Court of Appeals also denied Petitioner's subsequent motion to reargue on March 27, 2007.

For the ninth time in this case, and the second time in this Court, Petitioner is forcing Respondent to defend itself against her baseless allegations.

STANDARD

When a writ is sought to review a state court decision, this Court will only have jurisdiction if the case has been appealed to the highest court in the state and: (1) the state court reviewed the validity of a statute or treaty; (2) the validity of a state statute is drawn into question on the ground of its being "repugnant to the Constitution, treaties, or laws of the United States," or (3) "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . ."

28 U.S.C. § 1257 (2000). The federal issue must be either raised or "squarely considered and resolved" by the state court. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 218 n.1, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

Writs are granted only for compelling reasons. *See* SUP. CT. R. 10. As relevant here, this Court limits its review to cases where a state court has decided "an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." SUP. CT. R. 10(b), (c). This Court will decline review of a state court decision that rests on independent and adequate state law grounds. *See Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568, 97 S. Ct. 2849, 53 L. Ed. 2d 965 (1977). A petition based on erroneous factual findings is also "rarely granted," because the Court will defer to state court findings of fact in the absence of exceptional circumstances. *See Hernandez v. New York*, 500 U.S. 352, 366, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991) (plurality opinion).

ARGUMENT

Petitioner's litigation is abusive. This is Petitioner's ninth separate appeal from the Trial Court's October of 2000 judgment, and her second petition to this Court. During her first trip through the New York State and Federal legal systems, Petitioner converted a straightforward real property dispute into a morass of unintelligible constitutional arguments. Petitioner's real motivation here is to have this Court review the trial court's October 26, 2000 Judgment. This Court already determined that this decision does not merit review. Whether this is Petitioner's first, second or seventieth attempt, the result should be no different. Petitioner's

constitutional rights have not been violated simply because the Courts have consistently disagreed with her.

In addition to being duplicative, Petitioner's Petition is untimely. A petition for a *writ of certiorari* to review a judgment in a case entered by a state court of last resort must be filed within 90 days after entry of the judgment. SUP. CT. R. 13. As Petitioner states in her Petition:

> At issue in this Petition is the Appellate Division, Second Judicial Department's refusal and failure to address and render opinion on the validity of the joint venture accounting, accounting #1 also 'attached to and made part of the judgment' and the corresponding decretal paragraphs in the body of the judgment.
>
> The December 27, 2004, Decision and Order of the Appellate Division, Second Judicial Department, frustrates the Petitioner's guaranteed appeal as of right by its failure to address the preserved issues reflected in the joint venture accounting . . . .

Petition at 4. Respondent served Appellant with a copy of the December 27, 2004 Decision and Order by Notice of Entry, dated December 29, 2004—almost two years before her most recent appeal to the New York State Court of Appeals on October 31, 2006. For this reason, the Court of Appeals dismissed Petitioner's third attempt to appeal this Appellate Division decision to that Court as untimely. *See* Petitioner at App. 3. For those same reasons, Petitioner's Petition is also untimely here because it was filed almost a year and a half after the New York court of last resort denied her motion to reargue.

Finally, this case is completely devoid of constitutional issues. This Court has already made that determination, and Petitioner's only new hook—the

correction of a typographical error—does not make this New York real property dispute any more reviewable by the United States Supreme Court than it was in April of 2006, when this Court rejected Petitioner's prior petition for a *writ of certiorari*. When the Appellate Division vacated and replaced its March 28, 2005 decision with its August 8, 2006 decision, it merely corrected a typographical error. The Court of Appeals then dismissed Petitioner's appeal as untimely based solely on state law grounds. Petitioner now brings her typo to this Court's docket where it should be rejected as well because the correction of a typo does not create a compelling question of federal law that needs to be resolved here.

CONCLUSION

For the foregoing reasons, Respondent Ulster Savings Bank respectfully requests that this Court deny the Petition for a *writ of certiorari* in its entirety, grant Respondent its costs and expenses for opposing this Petition, including attorneys' fees, and grant such other and further relief as the Court deems just and proper.

Dated: New York, New York
July 27, 2007

Respectfully Submitted,

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